LIBRARY
SUPREME COURT, U. S.

NO. 686

FILED
NOV 20 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1967

HARRY C. DEVORE,

Appellant,

v.

WEST VIRGINIA BOARD OF DENTAL EXAMINERS, and EDWARD J. JOSEPH, J. J. HERLIHY, WILLIAM I. BAKER, A. BROOKS DRAKE and LAWRENCE FANTI, Members of West Virginia Board of Dental Examiners,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Charleston, West Virginia

THOMAS B. YOST
Assistant Attorney General
State of West Virginia
Charleston, West Virginia
Counsel for Appellees

INDEX

	Page
MOTION TO DISMISS	1
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	11

CITATIONS

Chenoweth v. *Keenan*, 61 W. Va. 108, 55 S. E. 991	4
Stembridge v. *Georgia*, 72 S. Ct. 834, 343 U. S. 541, 96 L. ed. 1130	5
Farley v. *Graney*, 146 W. Va. 22, 119 S. E. 2d 833	6
Parker v. *Los Angeles*, 338 U. S. 327, 94 L. ed. 144	7
Alabama Fed. of Labor v. *McAdory*, 325 U. S. 472, 89 L. ed. 1725	7
Camaro v. *San Francisco*, ... U. S. ....., 18 L. ed. 2d 930	7
See v. *Seattle*, ... U. S. ....., 18 L. ed. 2d 943	7
Asbury Hospital v. *Cass Co.*, 326 U. S. 207, 90 L. ed. 6	8
Adler v. *Board of Education*, 342 U. S. 485, 96 L. ed. 517	8
Walters v. *City of St. Louis*, 347 U. S. 231, 98 L. ed. 660	8
Johnson v. *U. S.*, 323 U. S. 10, 92 L. ed. 436	9

Howat v. *Kansas*, 258 U. S. 181, 66 L. ed. 550 11

American F. Ins. Co. v. *King Lumber, etc., Co.*, 250 U. S. 2, 636 L. ed. 810 11

STATE STATUTES

Chapter 30, Article 4, Sec. 4A 6

Chapter 55, Article 13, Code of W. Va. as amended 6

Chapter 62, Article 1A, Code of W. Va. as amended A-15

NO. 686

IN THE

Supreme Court of The United States

October Term, 1967

HARRY C. DEVORE,

Appellant,

v.

WEST VIRGINIA BOARD OF DENTAL EXAMINERS, and EDWARD J. JOSEPH, J. J. HERLIHY, WILLIAM I. BAKER, A. BROOKS DRAKE and LAWRENCE FANTI, Members of West Virginia Board of Dental Examiners,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the jurisdictional statements of appellant be dismissed on the grounds that the federal question sought to be reviewed was not timely or properly raised in the Cir-

cuit Court of Cabell County, West Virginia, and that the State court did not expressly pass on the federal question sought to be reviewed, and that no federal question is properly presented by appellant, and that the judgment of the Circuit Court of Cabell County rests upon an adequate non-federal basis, and that appellants have not exhausted the available State remedies.

STATEMENT OF THE CASE

On October 6, 1958, the Circuit Court of Cabell County, West Virgnia, issued an injunction order against the appellant Devore enjoining him from practicing dentistry in the State of West Virginia without first obtaining a license therefor.

Based upon numerous complaints by local dentists of the City of Huntington, Cabell County, West Virginia, that Mr. Devore was in fact continuing to practice dentistry at his laboratory located outside Huntington, West Virginia, Dr. Robert M. Wild, a practicing dentist and Secretary of the West Virginia Board of Dental Examiners, went to Devore's place of business and asked to examine the premises pursuant to law. Devore refused him entry and at a later date, that is to say on or about July 18, 1966, Dr. Wild, in the company of two Assistant Attorneys General of the State of West Virginia, once against visited Devore's laboratory and sought entrance to inspect and were once again denied entry.

Thereafter, on the 16th day of September, 1966, counsel for the appellee Board petitioned and moved the Circuit Court of Cabell County for an order modi-

fying the heretofore issued injunction order to permit members of the West Virginia Board of Dental Examiners to enter upon and inspect, during normal business hours, the business premises of Devore, the appellant herein. Nothing contained in said petition or motion indicated that the hearing was to be upon contempt of the injunction. However, immediately prior to the hearing, counsel for the Board was approached by an elderly gentleman who stated that Devore had recently made him a set of false teeth. After orally making its primary motion, counsel for the Board asked leave to allow this witness to testify. During this witness's testimony it became evident that Mr. Devore did not in fact make his teeth and upon motion by Devore's counsel his testimony was stricken without objection. Thereupon the Court granted the motion to amend the injunction order as prayed for.

Nowhere in the record of these proceedings is there any showing that counsel for Devore objected to the amendment on the grounds that the same was violative of either the State or Federal Constitution. No written pleadings were filed then or later setting up said grounds nor did the court ever rule on said grounds.

Thereafter, Devore, on the last day of the statutory appeal period, applied to the Supreme Court of Appeals of the State of West Virginia for appeal and supersedeas. The application was made without oral argument and upon the petition and memorandum of authorities accompanying the same. Thereafter on the 5th day of June, 1967, that court refused the appeal without hearing or written opinion as is the practice of that court. Appeal was then taken to this honorable Court.

ARGUMENT

I:

Although appellant appealed the order of the Circuit Court of Cabell County to the West Virginia Supreme Court of Appeals, the refusal of that court to grant the appeal can in no way be construed as an affirmation of the lower court's decision. See *Chenoweth* v. *Keenan*, 61 W. Va. 108, 55 S. E. 991, wherein it was held that:

> "* * * When a writ of error is taken from a circuit court to the supreme court, and it is simply dismissed, without hearing, the circuit court judgment still stands without action by the supreme court affirming it, because it takes reversal to affect it, the writ of error resting on error in the record, and is not a new trial. * * *"

This fact is important for the reason that the record reveals that appellant did not, in fact, raise the federal issues which he now alleges confer jurisdiction on this court, at the hearing in the Circuit Court of Cabell County, from which court he now seeks appeal. The constitutional grounds asserted in appellant's jurisdictional statement were raised for the first time upon appeal to the West Virginia Supreme Court of Appeals and were not specifically ruled upon by that court. Appellant's petition to our State Supreme Court (see Appendix A) states that the action of the lower court was "arbitrary" and its order of September 23, 1966 was "unconstitutional in its application", citing in his memorandum the Fourth Amendment of the United States Constitution and Sections 10 and 6 of Article III of the West Virginia Constitution (our due process

and search and seizure provisions). It is obvious therefore that in the absence of any written opinion by the State Supreme Court, our highest court, the court's refusal to grant the appeal could have rested upon adequate non-federal grounds. See *Stembridge* v. *Georgia*, 72 S. Ct. 834, 343 U. S. 541, 96 L.Ed 1130, wherein this court held that:

> "It is apparent from the record that the Supreme Court of Georgia took no action upon the question of federal constitutional rights raised for the first time on the motion for rehearing in the Court of Appeals. This was in accord with its rule that constitutional questions must first be raised in the trial court. Beckmann v. Atlantic Ref. Co. 181 Ga 456, 182 SE 595. The attempt to raise the question of constitutional rights in the general terms of the above quotation from the petition for certiorari did not begin to meet the requirement of the Supreme Court of Georgia for definiteness. Persons v. Lea, 207 Ga 384, 61 SE 2d 832.
>
> "At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment.* * *
>
> "The amending order of the Georgia Court of Appeals does not, in our view, change the posture of this case — it does not remove the strong possibility, in light of Georgia law, that the Supreme Court of Georgia might have rested its order on a nonfederal ground. We are without jurisdiction when the question of the existence

of an adequate state ground is debatable. Bachtel v. Wilson, 204 US 36, 51 L ed 357. 27 S Ct 243.

"The petition for certiorari was improvidently granted, and the case is dismissed."

It is therefore urged that the failure of appellant to properly and timely raise the federal issues in the trial court and for the further reason that the state's highest court could not have and did not in fact rule on such federal questions, removes jurisdiction from this honorable Court to consider this case.

II.

The thrust of appellant's argument to this Court is that Chapter 30, Article 4a (sic) of the Code of West Virginia is unconstitutional as being repugnant to Fourth Amendment to the United States Constitution. The statute in question is actually Chapter 30, Article 4, Section 4a, of the Code of West Virginia.

The statutes of West Virginia provide appellant with a complete and adequate means by which this question can be resolved, which remedy although available has not been utilized. We refer to Chapter 55, Article 13 of the Code of West Virginia known as the "Uniform Declaratory Judgments Act". (Appendix B) Under this statute, the constitutionality of a statute may be determined before or after breach at the petition of a properly interested party. *Farley* v. *Graney*, 146 W. Va. 22, 119 S. E. 2d 833. The availability of this remedy is doubly important inasmuch as the Circuit Court of Cabell County was never given

the opportunity to rule on the constitutional questions presented here and thus the doctrine of election of remedies is not available to the appellants herein. See *Parker* v. *Los Angeles*, 338 U. S. 327, 94 L. Ed. 144.

III.

Appellee Board has not attempted to implement the order of the Circuit Court of Cabell County, West Virginia, allowing its members to inspect appellant's premises, nor is such attempt alleged by appellant. Appellant therefore has suffered no actual injury by said order. No search has been made nor has appellant been charged with any violation of the injunction order complained of by failing to allow a search. His position is likened to one where a litigant is asking this court to rule in advance whether or not he has to obey a court order if such order is sought to be enforced in the future, and thus presents, at best, an academic question. *Alabama Fed. of Labor* v. *McAdory*, 325 U. S. 472, 89 L. ed 1725. On this ground alone, the instant case is readily distinguishable from the cases of *Camaro* v. *San Francisco*, ... U. S. ....., 18 L. ed 2d 930; and *See* v. *Seattle*, ... U. S. ....., 18 L. ed. 2d 943, cited by appellant as conferring jurisdiction on this court, since those cases involve persons either actually convicted of a crime or charged and waiting trial.

Appellant's appeal to this court is clearly premature. He has sustained no injury as a result of the lower court's decision and if appellees attempt to invoke the order at a later time, the laws and procedures of the State judicial system will afford appellant ample opportunities to properly assert in the State courts the

matters he now attempts to bring before this court. *Asbury Hospital* v. *Cass Co.*, 66 S. Ct. 61, 326 U. S. 207, 90 L. ed 6. As we have stated before, no state court has ruled on the alleged federal questions now before this court and in the absence of such a ruling this court has historically refused jurisdiction. *Adler* v. *Board of Education*, 72 S. Ct. 380, 342 U. S. 485, 96 L. ed. 517.

IV.

Appellant, in seeking review by this court, relies almost exclusively on the recent decisions of *Camaro* and *See, supra*, which were both decided by this court on the 5th day of June, 1967, which coincidentally was the same day the West Virginia Supreme Court of Appeals refused appellant's appeal thereto and thus obviously could not have had the benefit of these decisions. However, we still maintain that the purported federal questions presented to the State Supreme Court were not timely or properly made inasmuch as they were not raised at the trial court and further that the State Supreme Court's refusal to allow an appeal without a written opinion does not show that the federal questions were actually considered and passed upon and that the Court's decision could have been based upon adequate non-federal grounds. *Walters* v. *City of St. Louis*, 74 S. Ct. 505, 347 U. S. 231, 98 L. ed 660.

Even assuming that appellant has legally met the jurisdictional prerequisites of 28 USC 1257 (2), appellees contend that the cases relied on by appellant are (1) clearly distinguishable and (2) not applicable because they are not retroactive in their effect.

Essentially the *See* and *Camaro* cases are the same, the only difference being that one involved a private dwelling and the other a commercial establishment. This distinction is immaterial here since appellant could contend that his establishment meets either or both criteria in that it is a business establishment attached to his private dwelling. However, the real import of these decisions is that a warrantless search by government administrative officers, pursuant to authorizing statutes, is unconstitutional. The evil thus sought to be avoided is not a search but rather only a warrantless search. In the *Camaro* case, *supra*, this Court restated and approved the language of *Johnson* v. *United States*, 323 U. S. 10, 14, 92 L. ed 436, 68 S. Ct. 367, as follows:

> "'The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a *judicial officer*, not by a policeman or government enforcement agent.'" (Emphasis supplied.)

This philosophy was explained in more detail by this court in the *Camaro* opinion when it stated that:

> "In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the

> inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. * * *"

None of these principles apply to the instant case. Here the act complained of is not an attempted warrantless search by a government administrative officer, but rather a *judicial order* permitting such search, issued by the judge of the highest court of record of the county, based upon a verified petition and motion, and after a hearing thereon. (Appendix C) Such a judicial order certainly meets and even exceeds the requirement of obtaining a warrant from a police judge, mayor or local justice of the peace, who, under West Virginia procedure, are authorized to issue the same. Further, the laws of West Virginia make no provision for obtaining a civil administrative "inspection warrant" but only a criminal search and seizure warrant. (Appendix D) At best, appellant may only complain that the lower State court issued its order on insuf-

ficient grounds or without a showing of probable cause. Neither of these grounds presents a federal question reviewable by this court. *Howat* v. *Kansas*, 42 S. Ct. 277, 258 U. S. 181, 66 L. ed. 550; *American F. Ins. Co.* v. *King Lumber, etc., Co.*, 39 S. Ct. 431, 250 U. S. 2, 63 L. ed. 810.

The order of the lower court complained of herein was entered on the 23rd day of September, 1966, and the cases primarily relied upon by appellant were not decided until June 5, 1967. The rules laid down by the cases, *Camaro* and *See*, were not made retroactive and thus cannot form the basis for overthrowing an act which took place prior thereto. Of course, as we stated earlier, no search has yet been attempted under the court order complained of and thus neither the appellant nor this court could surmise or predict what action the State trial court would take if contempt proceedings were brought against appellant for failure to allow a search, and the constitutional issues herein presented by appellant were properly laid before such State trial court.

CONCLUSION

For the reasons hereinabove cited, it is respectfully urged that the appeal should be dismissed.

Respectfully submitted,

C. DONALD ROBERTSON
Attorney General

THOMAS B. YOST
Assistant Attorney General

Counsel for Appellees